10-2-2017

City of Middleton v. Coleman Homes, LLC Appellant's Brief Dckt. 45105

IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court Docket No. 45105-2017

THE CITY OF MIDDLETON,
Plaintiff-Counterdefendant-Respondent,

v.

COLEMAN HOMES, LLC, an Idaho limited liability company; WEST HIGHLANDS, LLC, an Idaho limited liability company; WEST HIGHLANDS SUBDIVISION HOMEOWNERS ASSOCIATION, INC., an Idaho corporation; WEST HIGHLANDS LAND DEVELOPMENT, LLC, an Idaho limited liability company,
Defendants-Counterclaimants-Appellants.

APPELLANTS' BRIEF

Appeal from the District Court of the Third Judicial District in and for the County of Canyon
Case No. CV-2015-8119
The Honorable Christopher S. Nye, Judge

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I. STATEMENT OF THE CASE

A. Nature of the Case

This case involves a contentious dispute between the City of Middleton, Idaho, and various entities involved in the development of West Highlands Subdivision ("Project") in the Middleton community. The Appellants are those entities involved in the Project's development: Coleman Homes, LLC, the builder ("Coleman Homes"); West Highlands, LLC, the developer ("West Highlands"); West Highlands Subdivision Homeowners Association, Inc., the homeowner's association ("West Highlands HOA"); and West Highlands Land Development, LLC, the landholding company for the Project ("WH Land").

This lawsuit arose from Middleton seeking to exact open space without properly compensating the Project, and a disagreement regarding how much land the West Highlands HOA must identify as public park space to Middleton under a Parks Dedication Agreement ("PDA"). The parties also disputed whether West Highlands and Coleman Homes would pay impact fees under an Impact Fee Agreement ("IFA"). These agreements prohibit Middleton from collecting impact fees from West Highlands and Coleman Homes in exchange for West Highlands HOA keeping a certain amount of park space open for the Middleton public.

Middleton, at the behest of Mayor Darin Taylor, sought to have it both ways, suing to enforce his contorted interpretation of the agreements, while also collecting impact fees. After West Highlands and Coleman Homes threatened a breach of contract counterclaim against Middleton for these illegally-collected fees, Middleton folded and returned $23,760.00—representing the amount of the illegally-collected impact fees.

Litigation ensued regarding how much space the West Highlands HOA must keep open for the public under the PDA. Middleton and West Highlands HOA agreed that the PDA was enforceable—the parties' cross-motions for summary judgment litigated only the issue of how much land must be dedicated as public space. Ultimately, the district court decided that West Highlands HOA must dedicate 12.8 acres of public park space to Middleton—an amount falling between that advocated by each side. The district court additionally awarded Middleton its fees and costs under I.C. § 12-120(3), and declined to award any to any of the Appellants.

The instant appeal asks this Court to vacate the district court award of attorney fees and costs to Middleton and remand to the district court with instructions to declare Appellants the prevailing party for the following reasons: (1) the district court erroneously failed to consider that the Appellants secured the return of illegally-collected impact fees from Middleton; (2) the district court failed to consider that the Appellants agreed that the parties' agreements were enforceable early on in the case; (3) the district court failed to distinguish among the several defendant-appellants involved in the action for the purposes of the award; (4) Middleton's memorandum of fees and costs was not timely filed or served; and (5) based on these erroneous conclusions, the district court abused its discretion in determining that Middleton was the overall prevailing party in the action.

B. Facts

Middleton approved the annexation, zoning, and development of the West Highlands Project in 2006. (R. at 816.) Construction began that same year. *Id.* At that time, Middleton did not have an impact fee ordinance. *Id.*

In January 2009, Coleman Homes sent an application to Middleton requesting modifications to the Project. (R. at 310-11.) As part of Middleton's approval process for the Project, it required the Project to dedicate over fifteen acres of parks and open spaces, as well as transportation improvements, to Middleton, despite the lack of an impact fee ordinance at the time of approval. (R. at 130.) Middleton approved this application. (R. at 816.) Had an impact fee ordinance been in place at the time the Project was approved, Middleton would not have required the open space commitment, and the Project would simply have been required to be responsible for impact fees pursuant to the ordinance. (R. at 131.)

In March 2009, Middleton still did not have an impact fee ordinance. (R. at 817.) The parties worked to find a solution for how future impact fees and credits for fees would be assessed on the ongoing Project. *Id.* Middleton, West Highlands, and Coleman Homes executed a Development Agreement, Revision #2 to address these issues, among others. (R. at 284-93.) Article IV of the Development Agreement addresses impact fees. (R. at 287-88.) Soon after, in June 2009, construction began on Phase 3 of the Project. (R. at 817.)

In July 2009, Middleton passed an impact fee ordinance—Ordinance No. 447. *Id.* This impact fee ordinance imposed a park impact fee of an astounding $2,635.00 per lot. *Id.* In the two years after Middleton passed Ordinance No. 447, Coleman and Middleton negotiated a resolution to the issue of impact fees, given that there was no impact fee ordinance at the time of the Project's approval. *Id.* Thus, the parties negotiated a mechanism to deal with the impact fee credits owed to the Project, coupled with assurances that appropriate open space was publicly available. *Id.*

The Impact Fee Agreement ("IFA") and the Parks Dedication Agreement ("PDA"), executed on December 8 and 15, 2011, respectively, are the result of the negotiations regarding the payment of impact fees and the credit due to the Project by virtue of providing open space and transportation improvements. (R. at 817; R. at 135-55.) In the IFA, Middleton, West Highlands, and Coleman Homes agreed that no impact fees were due (under the service level of Ordinance No. 447) to Middleton because the Project was providing certain parks and transportation improvements. (R. at 135-48.) In the PDA, West Highlands HOA and Middleton agreed to identify 12.8 acres of park lands within the Project. (R. at 150-55.) That agreement also mandated a reduction in open space in the event an impact fee ordinance with a lower level of service was passed. *Id.*

Around the time that the IFA and PDA were negotiated, Middleton was beginning to examine whether Ordinance No. 447 was legal. (R. at 177-80.) By 2012, that ordinance was repealed, and no new ordinance was passed until 2015. (R. at 817.)

Ordinance No. 447 was revoked as a result of the findings of a committee put together by Middleton to examine the legality of the impact fee. (R. at 177.) Middleton assembled an Impact Fee Committee that issued findings and recommendations on June 6, 2012 regarding the legality of Ordinance No. 447. (R. at 177-80.) Those findings and recommendations included a finding that the "Middleton Impact Fee Ordinance is not compliant with Idaho State Code . . ." and recommended refund of all impact fees collected under the repealed ordinance. (R. at 177.) In particular, the committee found that the repealed ordinance violated the Idaho Development Impact Fee Act ("IDIFA"). (R. at 177-80.) One identified violation was that the ordinance's

impact fee charge was simply too high—the committee found, via a study performed by Keller Associates, Inc., that "[t]he maximum justifiable park and pathway/trail impact fee that the City could assess to future residential development is $1,485 per residential unit (single family dwelling unit)." (R. at 214.)

Due to these findings, Middleton repealed the ordinance, and in 2015, Middleton passed a new parks impact fee ordinance, Ordinance No. 541. (R. at 817.) The new impact fee is set at the maximum justifiable rate of $1,485.00 per lot, a substantial decrease from the prior level of service that was used to calculate open space in the IFA. (*See id.*)

The instant dispute arose when Middleton passed its new Ordinance No. 541, which was at a much lower service level than Ordinance No. 447—the service level governing the IFA and PDA. (*See, e.g.*, R. at 9-13.) Around the time of filing suit, Middleton began to act contrary to its asserted litigation position by collecting impact fees (which were not due under the IFA and PDA) while at the same time asserting that the IFA and PDA were enforceable agreements. (R. at 43.)

C. Procedural History

Middleton filed a complaint for declaratory relief against the Appellants on September 4, 2015. (R. at 9.) The complaint sought a declaratory judgment that the IFA and PDA are valid and enforceable agreements despite Middleton's repeal of Ordinance No. 447. (R. at 9-13.) The Appellants answered, denying the enforceability of the IFA and PDA. (R. at 35-39.)

The Appellants, however, later moved to amend their answer to admit that the IFA and PDA were valid agreements, and to allege a counterclaim against Middleton. (R. at 41-64.) The

Appellants chose to move to amend their answer because Middleton was acting contrary to its asserted position in its complaint. (R. at 43.) Specifically, while seeking enforcement of the IFA and PDA (which prohibited collection of impact fees from the Project), Middleton was in actuality collecting fees from the Project. *Id.* Further, it became clear to the Appellants that the crux of the issue presented to the district court involved the interpretation of the IFA and PDA, rather than their enforceability, necessitating a counterclaim in that regard. *Id.*

The proposed counterclaim included a request that the district court declare that the IFA and PDA prohibited the collection of any impact fees from the Project, and that any impact fees that Middleton collected were collected in violation of the IFA and PDA under a variety of legal theories. (R. at 57-62.) Once it was clear that Middleton faced a counterclaim due to the illegally-collected fees, Middleton offered to return them. (Tr. Vol. I, p. 9, L. 16-25, p. 10, L. 1-25, p. 11, L. 1-22.) In its response to the Appellants' motion to amend their answer, Middleton stated, "Now that the Defendants concedes [sic] that they are valid the City will return the park impact fees collected upon this Court entering its Order that the Agreements are valid and binding between the parties." (R. at 74.) The Court allowed the Appellants to amend their answer, and entered an order finding that the IFA and the PDA are valid and enforceable, consistent with the parties' arguments at hearing on the Appellants' motion to amend. (R. at 87.) Middleton returned the impact fees in the amount of $23,760.00. (R. at 261.)

The parties filed cross-motions for summary judgment, requesting that the district court interpret the IFA and PDA. (R. at 112-484; 488-814.) The Appellants argued that the Project was responsible for 6.92 acres of public access space. (R. at 125-26.) Middleton argued that the

Project was responsible for 15.1 acres of public access space. (*E.g.*, R. at 743.) Middleton's argument was based not on the IFA or PDA itself, but rather the Project's conditions of approval. (*E.g.*, R. at 244.)

The district court held in its October 17, 2016 Memorandum Decision and Order on the Parties' Cross Motions for Summary Judgment that neither party was correct—the PDA required that the Project dedicate 12.8 acres of public space. (R. at 820.) The district court also held that "Coleman must provide one or more financial guarantees if Coleman applies for building permits before completion of the equivalent service level of parks and streets." (R. at 823.)

Both parties filed motions for reconsideration. (R. at 825-29; 833-61; 917-21.) Throughout this process, Middleton continued to argue that the Project must provide 15.1 acres. (R. at 826.) The district court denied both parties' motions for reconsideration. (R. at 943-45.)

The court entered a judgment consistent with its Memorandum Decision on November 2, 2016. (R. at 831.) Both sides filed petitions for attorney fees and costs. (R. at 862-916.) The Appellants moved to strike Middleton's petition for fees and costs as untimely filed and served. (R. at 922-24). They also moved to disallow Middleton's petition for fees and costs. (R. at 937-42.) The Appellants provided evidence that Middleton's petition for fees and costs was not timely served. (R. at 954-57.)

On February 8, 2017, the district court entered its Memorandum Decision and Order Awarding Attorney Fees and Costs to the City of Middleton in the Amount of $28,526.22 (R. at 958-65.) The district court found that Middleton was the prevailing party as follows:

> Overall, Middleton prevailed in this action. The Court granted Middleton's request for declaratory relief by ordering that the IFA and the PDA are valid and enforceable. On the ultimate issue of open space acreage, the Court's 12.8-acre determination is much closer to Middleton's position than Coleman's (a 2.3-acre difference versus a 5.88-acre difference). Middleton also avoided liability on Coleman's breach of contract counterclaim.

(R. at 961.)

The court also entered an amended judgment reflecting the attorney fee amount. (R. at 966-68.) The Appellants filed a motion to reconsider the attorney fee decision. (R. at 969-71; R. at 976-85.)

The Appellants also filed a motion to alter or amend the amended judgment, on the basis that the judgment did not clarify the relief that is accorded against the various parties. (R. at 972-75.) The court granted this motion (R. at 995-98) and entered a Second Amended Judgment consistent with this decision on April 10, 2017. (R. at 999-1001.)

II. ISSUES PRESENTED ON APPEAL

Attorney Fees in District Court Proceedings: Did the District Court abuse its discretion in declaring Middleton the prevailing party?

Attorney Fees on Appeal: The Appellants seek costs and attorney fees on appeal as authorized by I.A.R. 40 and I.A.R. 41. They base their claim for fees on I.C. § 12-120(3) and the parties' agreements as the prevailing party in a commercial transaction.

III. STANDARD OF REVIEW

"The determination of who is a prevailing party is committed to the sound discretion of the trial court." *Bream v. Benscoter*, 139 Idaho 364, 368, 79 P.3d 723, 727 (2003); *see also*

Idaho R. Civ. P. 54(d)(1)(B). To assess an abuse of discretion, this Court applies the three-factor test: "(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of this discretion and consistent with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason." *Bream*, at *id.* (citing *Fox v. Mountain West Elec., Inc.*, 137 Idaho 703, 52 P.3d 848 (2002)).

Idaho R. Civ. P. 54(d)(1)(B) sets forth the governing legal standards on the prevailing party issue. There are three factors the trial court must consider when determining which party, if any, prevailed: (1) the final judgment or result obtained in relation to the relief sought; (2) whether there were multiple claims or issues between the parties; and (3) the extent to which each of the parties prevailed on each of the claims or issues. *Nguyen v. Bui*, 146 Idaho 187, 192, 191 P.3d 1107, 1112 (Ct. App. 2008). "In determining which party prevailed where there are claims and counterclaims between opposing parties, the court determines who prevailed 'in the action': that is, the prevailing party question is examined and determined from an overall view, not a claim-by-claim analysis." *Oakes v. Boise Heart Clinic Physicians, PLLC*, 152 Idaho 540, 545, 272 P.3d 512, 517 (2012).

IV. ARGUMENT

A. The District Court Erred in Declaring Middleton the Prevailing Party.

1. The district court erred by failing to consider Middleton's return of the illegally-collected impact fees in its prevailing party analysis.

In a case with multiple claims between parties, the district court should consider in its prevailing party analysis: (1) the final judgment or result obtained in relation to the relief sought;

(2) whether there were multiple claims or issues between the parties; and (3) the extent to which each of the parties prevailed on each of the claims or issues. I.R.C.P. 54(d)(1)(B); *Nguyen*, 146 Idaho at 192, 191 P.3d at 1112.

Here, the district court simply failed to consider at all the result that Coleman Homes and West Highlands obtained by moving to amend their answer to bring a counterclaim against Middleton for $23,760.00 in illegally-collected fees in breach of the IFA. (*See* R. at 958-64.) Coleman Homes and West Highlands asserted the counterclaim as a result of Middleton's improper attempts to collect park impact fees, while simultaneously seeking enforcement of an agreement that prohibited Middleton from collecting the fees. (R. at 43.) When Coleman Homes and West Highlands threatened the counterclaim, Middleton quickly backed down and returned the sum of $23,760.00 in improperly collected impact fees. (Tr. Vol. I, p. 9, L. 16-25, p. 10, L. 1-25, p. 11, L. 1-22; R. at 74; R. at 261.)

Coleman Homes and West Highlands prevailed against Middleton on this issue. Coleman Homes and West Highlands recovered the illegally-collected fees against Middleton. The only relief that Middleton received against these parties is a potential requirement that West Highlands provide certain financial guarantees under the IFA. (R. at 1000.) For Coleman Homes, no relief was obtained against it, but it obtained relief against Middleton. The district court abused its discretion by failing to even consider that Coleman Homes and West Highlands obtained the result of the return of the impact fees, by failing to appreciate that Middleton obtained no relief against Coleman Homes, and by failing to consider that Middleton's relief

against West Highlands was minimal compared to the result that West Highlands obtained against Middleton.

2. The district court erred in considering the validity and enforceability of the IFA and PDA in its prevailing party analysis.

In determining that Middleton was the prevailing party, the Court relied upon the notion that "the Court granted Middleton's request for declaratory relief by ordering that the IFA and PDA are valid and enforceable." (R. at 961.) The presentation of this fact in the Court's order creates the illusion that the issue of enforceability was litigated as part of the summary judgment proceedings. However, once the Mayor's true goals were revealed and it was discovered that Middleton was surreptitiously collecting impact fees, the Appellants moved to amend their answer and assert a counterclaim. (R. at 43.) Therein, the Appellants admitted that the Impact Fee Agreement and Parks Dedication Agreement were enforceable. (R. at 89-94.) Middleton actually objected to the Appellants' motion to amend their answer. (R. at 66-74.) To be clear, the Court did not rule that the agreements were valid and enforceable during the course of this litigation—it was admitted by Appellants early in the case and before summary judgment proceedings. The vast majority of fees expended occurred long after this occurred. Thus, it was error for the district court to utilize the validity of the agreement in the prevailing party analysis.

3. In its prevailing party analysis, the district court failed to acknowledge that four separate entities are defendant-appellants in this lawsuit.

The district court's prevailing party analysis was in error, because it ignored the separate corporate identities of the four Appellants. (*See* R. at 958-64.) It is an abuse of discretion for a

district court to fail to distinguish among parties involved and not involved in a commercial transaction for the purposes of an attorney fee award.

In *Gunter v. Murphy's Lounge, LLC*, 141 Idaho 16, 21, 105 P.3d 676, 681 (2005), the plaintiff leased Murphy's Lounge from the owner, Mountain West Ventures, LLC and her liquor license from Murphy's Lounge, LLC. The plaintiff sued her lessors, as well as the individual owners of the entities, over a dispute regarding her lease; the plaintiff prevailed in the action and was awarded attorney fees against all defendants under I.C. § 12-120(3). 141 Idaho at 32, 105 P.3d at 692. But since her commercial transaction (the leases) only involved the business entities that were signatories, it was reversible error for the district court to award fees against the individual owners. *Id.* This Court therefore reversed the district court's award of attorney fees against the individuals. *Id.* ("Only Mountain West and Murphy's Lounge engaged in the commercial transaction with Gunter, however. Therefore the award of attorney fees should only be against those two Defendants."); *see also Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 718–20, 117 P.3d 130, 132–34 (2005).

Here, the district court erred in failing to distinguish among the various corporate entities involved in this suit.

(a) No relief was granted against WH Land or Coleman Homes; this Court should reverse the district court's finding that Middleton was the prevailing party.

WH Land was not a signatory to either the Impact Fee Agreement or the Parks Dedication Agreement. (R. at 135-55.) Thus, the district court did not grant any relief against this party, and WH Land was not party to the commercial transaction upon which the district

court based its award for attorney fees and costs. The district court therefore abused its discretion by assessing fees and costs against WH Land, and by failing to consider that WH Land avoided liability in the lawsuit. *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005) ("Avoiding liability is a significant benefit to a defendant. In baseball, it is said that a walk is as good as a hit. The latter, of course, is more exciting. In litigation, avoiding liability is as good for a defendant as winning a money judgment is for a plaintiff.")

Similarly, although Coleman Homes was a signatory to the IFA, the district court awarded no relief against it. Coleman Homes is not a signatory to the PDA—the document that the district court found required West Highlands HOA to keep open 12.8 acres of park space. (R. at 820.) The only part of the judgment relevant to Coleman Homes is the declaration that the Impact Fee Agreement is valid and enforceable—Coleman Homes acknowledged that long before substantive motion practice on any issue. (*See* Section A2, *supra*.) And, as explained above, the district court failed to consider that Coleman Homes obtained relief against Middleton related to the illegally-collected fees. (*See* Section A1, *supra*.) Therefore, the district court abused its discretion by assessing fees and costs against Coleman Homes.

Since WH Land and Coleman Homes had no relief accorded against them, and since Coleman Homes prevailed against Middleton, this Court should reverse the district court's prevailing party determination and hold that these parties prevailed in the action.

(b) The only relief granted against West Highlands is the requirement of potential financial guarantees.

The only relief that Middleton received against West Highlands is a potential requirement that it provide certain financial guarantees under the IFA but made no determination that such a financial guarantee was actually necessary. (R. at 1000.) The district court abused its discretion by failing to even consider that West Highlands obtained the result of the return of the impact fees, and by failing to consider that Middleton's relief against West Highlands was minimal compared to the result that West Highlands obtained against Middleton. (*See* Section A1, *supra*.) Since West Highlands had *de minimis* relief accorded against it, and since it prevailed against Middleton, this Court should reverse the district court's prevailing party determination and hold that West Highlands prevailed in the action.

(c) The only relief granted against West Highlands HOA was the open space acreage requirement.

In its prevailing party analysis, the district court relied on the determination that 12.8 acres of open space must be submitted as a result of the Parks Dedications Agreement. (*See* R. at 958-64.) That open space requirement is enforceable only against the signatory to the PDA. The only defendant that is a signatory to that agreement is West Highlands HOA.

4. Middleton is not the prevailing party.

Middleton did not avoid liability in this suit, because West Highlands and Coleman Homes recovered all illegally-collected impact fees from Middleton. (*See* Section A1, *supra*.) Additionally, Middleton did not prevail on the enforceability of the Impact Fee Agreement or the

Parks Dedication Agreement because the amended answer disposed of that issue early in the case and it was not adjudicated in the summary judgment decision. (*See* Section A1, *supra*.)

No or minimal relief has been granted against Coleman Homes, WH Land, and West Highlands. (*See* R. at 1000.) The only entity appreciably implicated in the district court's summary judgment decision is the HOA which is required to submit 12.8 acres of open space via the Parks Dedication Agreement. *Id.* Middleton, however, sought to increase that number to 15.1 utilizing an incorrect reading of the applicable agreements. (*E.g.*, R. at 743.) Where the single position taken by the plaintiff in the lawsuit—that is, seeking 15.1 acres of open space—is denied by the district court, there is no basis to conclude that Middleton is the prevailing party. To be sure, Middleton prosecuted a lawsuit seeking to obtain far more open space than it was entitled to. The district court denied that undertaking. With the addition of the fact that three of the four Defendants are not subject to significant relief in favor of Middleton, this position is bolstered. The district court erred in finding that Middleton was the overall prevailing party in the action.

5. Appellants were the prevailing parties.[1]

The foregoing argument establishes that Appellants are the prevailing parties. At the very least, three of the four Appellants prevailed in this lawsuit. Coleman Homes and West Highlands successfully recovered illegally collected impact fees. No relief was granted against Coleman Homes. No relief was granted against WH Land and it was not even a signatory to

[1] For the Court's ease of reference, the Appellants provide Appendix A as an illustrative exhibit showing the relief accorded to and against each Appellant.

either the IFA or the PDA. West Highlands was determined to be responsible for a guarantee but no decision was made mandating any action on the part of West Highlands. The only entity that was truly involved in the relief granted within this litigation on the side of the Appellants is West Highlands HOA. That entity litigated whether 12.8 acres of open space should be decreased by operation of the IFA and successfully defended a baseless allegation by the City of Middleton that the amount of open space should be increased. On this issue, neither Middleton nor West Highlands HOA prevailed.

B. Middleton's Memorandum of Fees and Costs Was Not Timely Filed or Served.

Idaho R. Civ. P. 54(d)(4) requires that a memorandum of costs and fees be "filed and served" on the adverse party "not later than 14 days after entry of judgment." *Id.*

1. Middleton's fee petition was not timely filed.

The district court ruled that the judgment was entered on November 7, 2017 and therefore a filing date of November 17, 2016 was timely pursuant to the rule. (R. at 1012-13.) In supporting this decision, the Court relied upon Idaho R. Civ. P. 58 and the Idaho Supreme Court decision *Stibal v. Fano,* 157 Idaho 428, 337 P.3d 587 (2014).

To begin, the original judgment in this case plainly stated "ENTERED this 2 day of November, 2016." (R. at 1009.) The stamp by the clerk indicates that it was filed on November 7, 2016. (R. at 1008.)

Idaho R. Civ. P. 58 states that the "filing of a judgment by the court as provided in Rule 5(d)" **OR** "the placing of the clerk's filing stamp on the judgment" consists of the clerk's entry of judgment. *Id.* In its order, the district court only considered the second aspect of Rule 58

regarding the placing of the clerk's stamp. (R. at 1013.) However, Idaho R. Civ. P. 5(d) states that entry is accomplished when a "judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk." *Id.* Pursuant to the combination of Rule 58 and Rule 5(d), the district court's notation of the entry as November 2 is binding and the memorandum of costs was not timely.

The district court's citation to the *Stibal* decision presents an altogether different factual scenario based on a completely different rule. In *Stibal,* the Idaho Supreme Court was presented with the issue of whether a notice of appeal was timely pursuant to Idaho Appellate Rule 14(a) which triggers a deadline "within 42 days from the date evidenced by the filing stamp of the clerk of the court on any judgment or order of the district court. . . ." 157 Idaho at 433, 337 P.3d at 592. The first aspect of Rule 58 cited above, referencing Rule 5(d) is not in the appellate rule deadline. Therefore, that case is not applicable.

2. The only evidence presented to the district court regarding the service of the Plaintiff's Fee Petition was the Supplemental Affidavit of Bradley J. Dixon in Support of Motion to Strike Plaintiff's Petition for Fees and Costs.

The district court's order ruled that a factual dispute existed between the parties regarding the service of the fee petition. Defendants presented the Supplemental Affidavit of Bradley J. Dixon in Support of Motion to Strike Plaintiff's Petition for Fees and Costs outlining the fax receipt and logging procedures at Givens Pursley, LLP as well as detailing the efforts to obtain a copy of the un-served petition. (R. at 954-56.) Middleton provided no rebuttal, was careful at argument not to represent that the documents were definitively served, and noted only that a certificate of service was attached to the documents alleging service on November 17, 2016. (Tr.

Vol. I, p. 44, L. 11-19.) Citing to *Allstate Ins. Co. v. Mocaby,* 133 Idaho 593, 990 P.2d 1204 (1999), the Court concluded that this was a factual dispute and ruled that the service had been timely completed in the absence of any affirmative evidence or even allegation that it had been served correctly.

The *Allstate* decision reveals a completely opposite set of circumstances applying an analysis in the opposite direction from the court here. There, Allstate alleged that Mocaby had failed to timely **object** to its petition for fees and costs. 133 Idaho at 599-600, 990 P.2d at 1210-1211. Based on a handwritten note on the top of its memorandum of costs, as well as a certificate of service, Allstate argued that it filed on July 11 and Mocaby's July 30 objection was untimely. *Id.* However, the memorandum also bore facsimile dating on the top of each page noting a July 15 date. *Id.* Because the Idaho Supreme Court was unable to definitively determine when Allstate filed its petition, it concluded that the Mocaby objection was timely. *Id.* In sum, the Idaho Supreme Court gave the benefit of the doubt to the objecting party, not the filing party, when no evidence was available to determine the filing date.

Here, the district court was presented with evidence that the certificate of service was incorrect and, indeed false. Middleton did not present a single bit of corroborating evidence to support the November 17 service date and was careful in its representations to the Court. Nonetheless, despite Appellants having their time to respond drastically decreased and despite no evidence from Middleton that the November 17 date was actually correct, the district court gave the offending party the benefit of the doubt and resolved what it describes as a factual dispute when no facts were presented corroborating the November 17 service date. Taking the district

court's logic to the necessary conclusion, had the Appellants objected fourteen days from the date they were actually served with the fee petition, the district court, using the unsupported November 17 service date, would apparently conclude that Appellants' objection was untimely. That reasoning creates a result directly contrary to the very Supreme Court decision cited.

The *Allstate* decision first requires an actual factual dispute and second requires that the benefit of the doubt should go to the non-offending party. *Allstate* also refused to exclusively rely on the certificate of service. Here, the only actual evidence regarding service is the supplemental affidavit served by the Appellants. Nothing in the record creates a factual dispute. It is noteworthy that Middleton never responded to that affidavit. To be consistent with *Allstate,* this Court should conclude that service was untimely.

C. The Appellants Should be Awarded Their Fees and Costs on Appeal

The Appellants request and are entitled to attorney fees and costs on appeal pursuant to I.A.R. 40 and 41 and under Idaho Code § 12-120(3) and the operative agreements as the prevailing party on appeal.

V. CONCLUSION

For the foregoing reasons, the Appellants respectfully request this Court vacate and remand the judgment of the district court and award them their attorney fees and costs in bringing this appeal.

DATED: October 2, 2017.

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APPENDIX A

Party	Signatory to These Agreements	Relief Obtained Against Middleton	Relief Awarded Against Party
West Highlands Land	None	None	None
Coleman Homes, LLC	IFA	Return of impact fees collected in violation of the IFA in the amount of $23,760.00	None, other than declaration that IFA is enforceable
West Highlands, LLC	IFA	Return of impact fees collected in violation of the IFA in the amount of $23,760.00	Declaration that IFA is enforceable Contingent obligation to provide financial guarantees
West Highlands HOA	PDA	None	Requirement of 12.8 acres open space, an amount less than that requested by Middleton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of October, 2017, I served a true and correct copy of the foregoing **APPELLANTS' BRIEF** in the above-entitled matter as follows:

Joseph W. Borton Borton Lakey Law Offices 141 E. Carlton Ave. Meridian, ID 83642 Facsimile: 208-493-4610 Email: joe@borton-lakey.com *Attorneys for Respondent The City of Middleton*	[___] Via U.S. Mail [___] Via Facsimile [__] Via Overnight Mail [X] Via Hand Delivery [___] Via email

By: _____
Bradley J. Dixon
Kersti H. Kennedy